Supreme Court, U.S.
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No. 99-1358

In The

Supreme Court of the United States

FRIZZELL CONSTRUCTION COMPANY, INC.,

Petitioner,

v.

GATLINBURG, L.L.C.,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Tennessee

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESTATEMENT OF QUESTION PRESENTED

Whether this Court should review the decision of the Tennessee Supreme Court in which the Tennessee Supreme Court construed a Tennessee choice-of-law clause in a Tennessee contract according to Tennessee law.

RULE 29.6 STATEMENT

The caption contains the names of all the parties that appeared in the Tennessee Supreme Court. Gatlinburg, L.L.C. ("Gatlinburg") is a Tennessee limited liability company. There is no parent or publicly held company owning ten percent (10%) or more of the stock of Gatlinburg.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Gatlinburg, L.L.C. ("Gatlinburg") respectfully submits this Brief in Opposition to the Petition for a Writ of Certiorari filed by Frizzell Construction Company, Inc. ("Frizzell"), requesting that this Court deny Frizzell's Petition.

OPINIONS BELOW

The Award of the Arbitrators of the American Arbitration Association, Arbitration Tribunal, in the matter of Frizzell Construction Company, Inc. and Gatlinburg, L.L.C., Case No. 39 Y 110 00107 97, executed on September 1, 1998, is unreported and reproduced in the appendix hereto ("App.") at 1a. The Award is part of the state court Record in this case.

STATEMENT OF JURISDICTIONAL BASIS

Petitioner has attempted to invoke the jurisdiction of the Court under 28 U.S.C. § 1257(a).

Under 28 U.S.C. § 1257(a), this Court has appellate jurisdiction to review a final judgment rendered by the highest court of a State in which the decision could be had "where the validity of a treaty or a statute of the United States is drawn into question or where the validity of a statute of any state is drawn into question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States."

Respondent contends that § 1257(a) jurisdiction does not exist because Petitioner fails to show that a federal question was raised or decided below and Petitioner fails to show that the validity of any Tennessee statute was drawn into question on federal grounds.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions set forth in Petitioner's Petition for a Writ of Certiorari ("Petition"), the Tennessee Uniform Arbitration Act, codified at Tenn. Code Ann. § 29-5-301 – § 29-5-320 (Supp. 1990) ("TUAA"), is discussed in this case. Tennessee Code Annotated § 29-5-302 provides in pertinent part as follows:

> **Agreements to Submit to Arbitration – Jurisdiction.** – (a) A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable save upon such grounds as exist at law or in equity for the revocation of any contract, . . .

Respondent provides this reference to the Tennessee statute solely to support Respondent's contention in Part V of this Brief that the Federal Arbitration Act ("FAA") and the TUAA contain identical language and are consistent. The validity of the Tennessee Uniform Arbitration

Act has not been drawn into question on federal grounds by either the Petitioner or Respondent.

RESPONSE TO STATEMENT OF THE CASE

Although Respondent agrees with the broad outline of the Petitioner's Statement of the Case, Respondent maintains that Petitioner's statement glosses over the timing of the state court proceedings of this case in a way that may be misleading to this Court and should be corrected.

It is true that Frizzell filed an action on August 1, 1997, in the Chancery Court for Sevier County, Tennessee. The complete title of the action is "Complaint to Enforce Mechanic's Lien and for Breach of Contract." On October 14, 1997, Gatlinburg filed its Answer, Counterclaim, and Third Party Complaint, setting forth, among other things, its counterclaim that Frizzell had fraudulently induced it to enter into the contract. It was not until after Gatlinburg filed its Answer and Counterclaim that Frizzell filed its demand for arbitration with the American Arbitration Association on or about November 3, 1997. The Demand for Arbitration was served on Gatlinburg as an exhibit to Frizzell's Motion to Stay Proceedings Pending Arbitration filed on or about November 11, 1997. None of the pleadings filed by Frizzell invoked or even mentioned the FAA and the applicability thereof until Frizzell filed its Memorandum of Law in Support of its Motion to Stay Proceedings Pending Arbitration on or about December 11, 1997.

Petitioner correctly notes that the Chancery Court for Sevier County granted Frizzell's request for a stay and submitted its claim for payments under the contract to arbitration, but enjoined arbitration of Gatlinburg's fraudulent inducement claim. Petitioner fails to mention that the parties submitted all issues in dispute with the exception of fraud in the inducement to arbitration with the American Arbitration Association and that the American Arbitration Association, Arbitration Tribunal issued an Award of the Arbitrators on September 1, 1998. The arbitration panel decided in favor of Frizzell on the issue of payments and granted an award to Frizzell in the amount of $651,325.00 in full settlement of all claims and counterclaims submitted in the arbitration. The Award of the Arbitrators is reproduced in the Appendix hereto. Gatlinburg's claim that Frizzell fraudulently induced it to enter into the contract was an issue reserved for judicial determination *after*, not before, the parties completed the arbitration process of all other claims.

REASONS FOR DENYING THE PETITION

The Court should deny the Petition. This Court lacks jurisdiction under 28 U.S.C. § 1257(a) because Petitioner has failed to show that a federal question was raised and decided in the state court proceedings and Petitioner has failed to show that any Tennessee statute was drawn into question on federal grounds. The judgment of the Tennessee Supreme Court rested on independent and adequate state grounds. This is a case involving the interpretation by Tennessee state courts of a Tennessee choice-of-law clause in a contract executed by two Tennessee parties.

The Tennessee Supreme Court's decision was guided by and is compatible with this Court's precedents and fully supports the policies underlying the Federal Arbitration Act.

I. THIS COURT DOES NOT HAVE JURISDICTION PURSUANT TO 28 U.S.C. § 1257(a).

Respondent contends that § 1257(a) jurisdiction does not exist because Petitioner has failed to show that a federal question was raised and decided in the state court proceedings and Petitioner has failed to show that any Tennessee statute was drawn into question on federal grounds. Petitioner bears the burden of establishing this Court's jurisdiction, *Durley v. Mayo*, 351 U.S. 277, 285 (1956), and has failed to carry that burden.

Under 28 U.S.C. § 1257(a), this Court has appellate jurisdiction to review a final judgment rendered by the highest court of a State in which the decision could be had "where the validity of a treaty or statute of the United States is drawn into question or where the validity of a statute of any state is drawn into question on the ground of its being repugnant to the Constitution, treaties or laws of the United States."

This Court lacks appellate jurisdiction if a federal question was not raised or decided in the state court below: "If both of these do not appear on the record, the appellate jurisdiction fails." *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (citing *Crowell v. Randell*, 10 Pet. 368, 391 (1836)). To establish jurisdiction, it is essential:

> [T]hat it must appear affirmatively from the record, not only that a federal question was

> presented for decision to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it.

Lynch v. New York ex rel. Pierson, 293 U.S. 52, 55 (1934).

Petitioner's Statement of the Case fails to specify exactly what federal question was raised and decided below and at what point or points in the state court proceedings a federal question was raised or decided as required by Rule 14(1)(g)(i) of the Supreme Court.

The opinions below do not show that a federal question was sufficiently and properly raised or decided. As will be discussed in Parts IV and V of this Brief, the Tennessee Supreme Court looked to the precedents of this Court to guide its application of state law but not as the dispositive basis for its decision. It is clear from the face of the opinion that the Tennessee Supreme Court primarily based its interpretation of the arbitration contract on ordinary state-law contract principles as set forth in Tennessee case law.

Petitioner also fails to show that any Tennessee statute was drawn into question on federal grounds. Specifically, Petitioner does not address the TUAA or allege that the TUAA is repugnant to federal law. Petitioner does not provide any reference to or the verbatim text of any Tennessee statute as required by Rule 14(1)(f) of the Supreme Court.

Petitioner did not and cannot draw any Tennessee statute into question under the circumstances of this case. The Tennessee Supreme Court's decision was not based on a state statute and the decision was not in favor of any state statute as opposed to federal law. The Tennessee Supreme Court decided the case pursuant to Tennessee law and ordinary state-law principles regarding contract interpretation.[1]

II. THE TENNESSEE SUPREME COURT'S DECISION RESTS ON ADEQUATE AND INDEPENDENT STATE GROUNDS.

If this Court should determine that a federal question was sufficiently and properly raised and decided below,

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[1] In *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989), this Court addressed the issue of § 1257(a) jurisdiction in a case involving the judgment of the California Court of Appeal. *Id.* at 472 n.4. The Court concluded that appellate jurisdiction was assured because the appellant explicitly drew into question the validity of a California arbitration statute on federal grounds, contending that the statute was pre-empted by the FAA and thus invalid under the Supremacy Clause. *Id.* The California Court of Appeal upheld the statute against the federal challenge and jurisdiction was found because the Court of Appeal's decision was based on the applicability of the state statute to the arbitration agreement. *Id.*

In this case, Petitioner did not bring any state statute into question on federal grounds. The state courts did not address the validity of the Tennessee Uniform Arbitration Act or any other state statute. The Tennessee Supreme Court did not rest its decision on the FAA, the TUAA or any other state statute.

Respondent, in the alternative, contends that the judgment of the Tennessee Supreme Court in this matter is based on separate, adequate and independent state grounds and thus is not subject to this Court's review.

This Court adheres to the long-standing principle that it will not review judgments of state courts that rest on adequate and independent state grounds. *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945). If it is not clear whether the state court's decision rested on a federal ground or an adequate state ground, the Court will not review the decision. *Id.* at 126. If the judgment of the state court rests on two grounds, one involving a federal question and the other a state ground, and the ground independent of the federal question is sufficient to sustain the judgment, this Court will not take jurisdiction. *Lynch v. New York ex rel. Pierson*, 293 U.S. 52, 54-55 (1934). If the state court decision clearly shows that it is based on "bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." *Michigan v. Long*, 463 U.S. 1032, 1041 (1983).

Respondent submits that the judgment of the Tennessee Supreme Court did not rest on a determination of a federal question. The opinion shows that the Tennessee Supreme Court considered, for purposes of guiding its own interpretation of the Tennessee arbitration agreement, certain of this Court's precedents involving application of the FAA and the underlying policies of the FAA. However, the judgment of the Tennessee Supreme Court was fundamentally based on ordinary state-law contract principles as set forth in Tennessee case law, in particular, the primacy of the parties' intentions and the importance of reading the contract as a whole and harmoniously

construing all provisions. Slip Opinion, App. 1 to the Petition ("Slip Opinion") at 9a-10a.

III. THE TENNESSEE SUPREME COURT INTERPRETED A PRIVATE CONTRACT BETWEEN TENNESSEE PARTIES AND APPLIED ORDINARY STATE-LAW CONTRACT PRINCIPLES.

This is a case involving the interpretation by Tennessee state courts of a Tennessee choice-of-law clause in a contract executed by two Tennessee entities. The parties chose the law of their home state as the applicable law and the Tennessee Supreme Court with its superior expertise in matters involving Tennessee law decided this case based on that law.

The Tennessee Supreme Court held that the choice-of-law clause of the contract, which expressly states that it is governed by Tennessee law, means that the parties agreed to arbitrate only those issues that are arbitrable under state law. Slip Opinion at 11a.

This Court has emphasized that the construction of state contract law by state courts is not ordinarily subject to its review. In *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989), this Court noted: "Appellant acknowledges, as it must, that the interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review." *Id.* at 474. *See also Arkansas La. Gas Co. v. Hall*, 453 U.S. 571, 579 n.9 (1981) ("The state court found that the contract had been breached. We will not overturn the construction of Louisiana law by the highest court of that State."); *cf. Michigan v. Long*, 463 U.S. 1032, 1039 (1983)

("The process of examining state law is unsatisfactory because it requires us to interpret state laws with which we are generally unfamiliar.").

In decisions involving arbitration clauses, this Court repeatedly has distinguished its deferential review of state courts interpreting their own laws from its de novo review of federal courts exercising diversity jurisdiction and applying state law under the *Erie* doctrine.

In *Volt*, this Court deferred to the California Court of Appeal's construction of a choice-of-law clause that the clause incorporated a California statute, which allowed a court to stay arbitration pending resolution of related litigation involving third parties not bound by the arbitration agreement. *Id.* at 475.

In cases involving de novo review of the decisions of federal courts exercising diversity jurisdiction in interstate commerce matters, including *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), this Court has reversed federal courts on the basis that the federal courts incorrectly interpreted or misapplied state law. *Mastrobuono*, 514 U.S. at 64.

In Footnote 4 of *Mastrobuono*, this Court emphasizes the distinction between the two types of judicial review:

> The dissent makes much of the similarity between this choice-of-law clause and the one in *Volt*, which we took to incorporate a California statute allowing a court to stay arbitration pending resolution of related litigation. In *Volt*, however, we did not interpret the contract de novo. Instead we deferred to the California court's construction of its own state's law . . . ("the interpretation of private contracts is ordinarily a

> question of state law, which this Court does not sit to review"). In the present case, by contrast, we review a federal court's interpretation of this contract, and our interpretation accords with that of the only decision-maker arguably entitled to deference – the arbitrator.

514 U.S. at 60 n.4 (citations omitted).

The Tennessee Supreme Court has the necessary expertise to interpret contracts governed by Tennessee law. By granting this Petition, this Court would place itself in the position of interpreting and potentially rewriting Tennessee contract law. If this Court decides this case in favor of the Petitioner, this Court will necessarily be required to hold that the Tennessee Supreme Court has misstated Tennessee law. In keeping with federalism principles and its respect for the independence of state courts, this Court has recognized that this Court's role is not to interfere with the state high courts' interpretation of their own laws and application of ordinary state-law principles. This Court should deny the Petition and allow the Tennessee Supreme Court to interpret contracts according to Tennessee law.

IV. THE TENNESSEE SUPREME COURT'S DECISION IS CONSISTENT WITH THIS COURT'S PRECEDENTS INCLUDING *VOLT* AND *MASTROBUONO*.

Frizzell maintains that this Court should grant its Petition because the decision of the Tennessee Supreme Court directly conflicts with this Court's precedents and particularly with this Court's decision in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995). Frizzell

contends that the Tennessee Supreme Court did not properly consider this Court's previous decisions and "flouts the rule of *Mastrobuono*." Petition at 11.

Respondent contends that the Tennessee Supreme Court examined and discussed certain of this Court's opinions and the language of the FAA to guide its application of state law. The decision was compatible with and does not conflict with this Court's previous rulings, including *Mastrobuono*.

Specifically, the Tennessee Supreme Court reviewed certain of this Court's decisions regarding the FAA for guidance in its application of state law in this case. In keeping with this Court's contract interpretations and concern with the parties' intent in previous decisions, the Tennessee Supreme Court construed together the arbitration clause and the Tennessee choice-of-law clause in the parties' contract to mean that the parties intended to arbitrate only those issues that are arbitrable under Tennessee law. The Tennessee Supreme Court concluded:

> [T]he FAA requires the courts of this state to enforce arbitration agreements according to their terms. Because the parties in this case have agreed to arbitrate their disputes to the extent allowed by Tennessee law, we therefore hold that the Chancery Court properly submitted all issues relating to the merits of the contract to arbitration. We also hold that the Chancery Court properly withheld the issue of fraudulent inducement from arbitration in accordance with the intention of the parties.

Slip Opinion at 11a.

The Tennessee Supreme Court's decision is harmonious with this Court's decision in *Volt* where the Court deferred to the California Court of Appeal's decision that the parties' choice-of-law clause incorporated California statutory arbitration rules which allowed the stay of arbitration even though the FAA would have otherwise permitted arbitration to go forward. *Volt*, 489 U.S. at 478-79. The *Volt* court found that "by permitting the courts to 'rigorously enforce' such agreements according to their terms, we give effect to the contractual rights and expectations of the parties, without doing violence to the policies behind by the FAA." *Id.* at 479 (citing *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985)).

The Tennessee Supreme Court's decision does not directly conflict with the Court's ruling in *Mastrobuono* or allow state arbitration law to displace federal arbitration law, as Petitioner claims. Petition at 11-12.

In *Mastrobuono*, this Court looked to the intent of the parties, following standard contract law principles. In its de novo review of the parties' agreement, the Court emphasized that the "FAA's pro-arbitration policy does not operate without regard to the wishes of the contracting parties." 514 U.S. at 57-58. The Court found that the parties' intent, as evidenced in their agreement, was to permit the arbitration panel to award punitive damages even though a New York statute would have prohibited such damages. *Id.* at 63-64. The Court reasoned that the parties agreed to an arbitration clause providing that arbitration was to be governed by the rules of National Association of Securities Dealers ("NASD"), which authorized the award of punitive damages. *Id.* at 61-62.

In determining the intent of the parties, the Court found that the arbitration clause incorporating the rules of NASD showed that the parties agreed to permit punitive damages and that the parties' intent outweighed the general choice-of-law clause, incorporating the New York statute, which would have precluded such damages. *Id.* at 61-62. The Court concluded that the choice-of-law clause introduced ambiguity into an arbitration agreement that otherwise would have allowed punitive damages. *Id.* at 62. The Court applied common law rules of contract interpretation: ambiguous language should be construed against the party drafting it and a document should be construed to render all provisions consistent with each other. *Id.* at 63.

The instant case can be distinguished from *Mastrobuono*. First, if this Court determines it has § 1257(a) jurisdiction and grants the Petition, this Court does not sit to interpret the arbitration agreement de novo. This Court's review of the Tennessee Supreme Court's decision would be deferential, not de novo. *Mastrobuono*, 514 U.S. at 60 n.4. Second, a New York statute precluding punitive damages in an arbitration award was at issue in *Mastrobuono*. There is no Tennessee statute at issue in this case. Third, the Tennessee Supreme Court found no ambiguity in the language of the arbitration agreement that would permit the arbitration provision to negate the parties' intent underlying the general choice-of-law clause. Slip Opinion at 9a-10a.

In the opinion below, the Tennessee Supreme Court applied established state law and looked to the parties' intentions in the contract. Following Tennessee precedents, the court construed the arbitration clause and the

Tennessee choice-of-law clause to mean that the parties intended to submit all disputes to arbitration to the extent permitted by state law, e.g., all issues except contract formation issues. *Id.* at 10a. Although the outcome in this case is necessarily different from the outcome in *Mastrobuono*, the decision of the Tennessee Supreme Court was guided by and compatible with the contract interpretation principles applied by this Court in *Mastrobuono*.

Frizzell also urges this Court to review the decision of the Tennessee Supreme Court because it allegedly conflicts with the decision of the Court of Appeals for the Sixth Circuit as well as the decisions of other federal circuits and state high courts. In accordance with established federalism and jurisdictional principles, the Sixth Circuit's decisions are not binding on the Tennessee Supreme Court where a question of contract interpretation under Tennessee law is involved and neither are the decisions of other federal circuits and state high courts. In addition, Respondent notes that other federal circuits, federal district courts and state courts have rendered decisions consistent with the Tennessee Supreme Court decision.[2]

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[2] *See* Thomas A. Diamond, *Choice-of-Law Clauses and Their Preemptive Effect Upon the Federal Arbitration Act: Reconciling the Supreme Court Within Itself*, 39 Ariz. L. Rev. 36 (1997), which cites as follows:

> *Ekstrom v. Value Health, Inc.*, 68 F.3d 1391, 1395-96 (D.C. Cir. 1995) (construing clause to require application of Connecticut's arbitration law providing a 30-day statute of limitations for vacating arbitration awards); *Barbier v. Shearson Lehman Hutton, Inc.*, 948 F.2d 117, 122 (2d Cir. 1991)

V. THE TENNESSEE SUPREME COURT'S DECISION SUPPORTS THE POLICIES UNDERLYING THE FEDERAL ARBITRATION ACT.

This is a case in which the holding arises from the application of ordinary state-law contract principles, not the application of the Federal Arbitration Act. Nonetheless, Respondent emphasizes that the decision of the Tennessee Supreme Court is consistent with the language of

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(construing clause to require application of New York's arbitration law prohibiting an arbitrator from awarding punitive damages); *Jeppsen v. Piper, Jaffray & Hopwood, Inc.*, 879 F. Supp. 1130, 1135 (D. Utah 1995) (construing clause to require application of Minnesota's arbitration law regarding timeliness of motion to vacate arbitration award); *Rhodes v. Consumers' Buyline, Inc.*, 868 F. Supp. 368, 373 (D. Mass. 1993) (construing clause to require application of New York's arbitration law, invalidating agreement to arbitrate); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jana*, 835 F. Supp. 406, 413 (N. D. Ill. 1993) (construing clause to require application of New York's arbitration law prohibiting an arbitrator from awarding punitive damages); *Melun Indus., Inc. v. Strange*, 898 F. Supp. 995, 999 (S.D.N.Y. 1992) (construing clause to require application of New York's arbitration law prohibiting arbitrator from modifying award); *Armco Steel Co. v. CSX Corp.*, 790 F. Supp. 311, 318 (D.D.C. 1991) (construing clause to require application of Ohio's arbitration law prohibiting arbitration of a dispute within a contract judicially declared invalid).

39 Ariz. L. Rev. at 35 n.90, all of which are consistent with the decision of the Tennessee Supreme Court in this case.

both federal and state arbitration acts and fully supports the policies of the FAA.

Section 2 of the FAA, 9 U.S.C. § 2, provides that a written agreement to arbitrate "shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

The Tennessee Uniform Arbitration Act mirrors the FAA. Tennessee Code Annotated § 29-5-302 provides that a written agreement to arbitrate shall be "valid, enforceable and irrevocable save upon such grounds as exist at law or in equity for the revocation of any contract, . . . "

As this Court confirms, the FAA was designed "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate," *Volt*, 489 U.S. at 474, and its policy "is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Id.* at 476. The FAA has no express preemptive provision and state law is preempted only to the extent that it conflicts with or blocks the full purposes of the FAA. *Id.* at 477. The FAA does not require parties to arbitrate all claims:

> Accordingly, we have recognized that the FAA does not require parties to arbitrate when they have not agreed to do so, nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreements. It simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms.

Id. at 478 (citations omitted).

The Tennessee Supreme Court was guided by *Volt*'s holding that the purpose of the FAA is to ensure that parties' agreements to arbitrate are enforced according to the terms of the agreement. Slip Opinion at 6a-7a. Consistent with this Court's reasoning in *Volt* and state-law contract principles, the Tennessee Supreme Court concluded that "parties cannot be forced to arbitrate claims that they did not agree to arbitrate." *Id.* at 7a (citing *Volt*, 489 U.S. at 476; *Mastrobuono*, 514 U.S. at 57; *AT&T Techs., Inc. v. Communications Workers of America*, 475 U.S. 643, 648 (1986)). The Tennessee Supreme Court reasoned that if the parties agreed not to submit the claim of fraudulent inducement to arbitration, the parties cannot be compelled to arbitrate the claim, even though the claim itself can be arbitrated under the FAA. Slip Opinion at 8a.[3]

This construction by Tennessee's high court is fully consistent with the FAA's purpose of enabling private parties to arbitrate in accordance with their wishes. Also, it is consistent with this Court's instruction that courts should generally apply "ordinary state-law principles" in determining whether the parties have agreed to submit certain issues to arbitration. *See First Options of Chicago,*

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[3] The Tennessee Supreme Court addressed Frizzell's argument that this Court's decision in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), compels arbitration of the fraudulent inducement claim, explaining that the parties in *Prima Paint Corp.*, unlike the parties in the instant action, did not intend to withhold the fraudulent inducement claim from arbitration and that if the evidence showed such intent, a different conclusion may have resulted. *Id.* at 8a n.11 (citing *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)).

Inc. v. Kaplan, 514 U.S. 938, 944 (1995) ("[C]ourts generally should apply ordinary state-law contract principles that govern the formation of contracts. . . . The relevant state law here [Illinois], for example, would require the court to see whether the parties objectively revealed an intent to submit the arbitrability issue to arbitration."). Relying on Tennessee case law, the Tennessee Supreme Court interpreted the arbitration and choice-of-law clauses according to applicable state law principles relating to the intention of the parties and the requirement for reading the contract as a whole. The court relied on and cited several Tennessee precedents to hold that the parties may choose the arbitration law by which they will be governed. Slip Opinion at 9a-11a.

In this matter, the parties agreed to arbitrate and indeed have submitted all their disputes to arbitration to the extent permitted by Tennessee law. Submitting the issue of fraudulent inducement for judicial resolution according to Tennessee law does not subvert or undermine the proarbitration policies behind the FAA, policies which the parties have convincingly supported by the submission of their claims to binding arbitration.

As its final reason for urging this Court to grant the Petition, Frizzell maintains that the question presented is important and recurring. Although a question involving the interpretation of a Tennessee contract is indeed important in the State of Tennessee, it does not rise to a level of national interest so as to compel this Court to review the decision.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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ATTACHMENT "A"

AMERICAN ARBITRATION ASSOCIATION
Arbitration Tribunal

In the Matter of the Arbitration between

Frizzell Construction Company, Inc.
– and –
Gatlinburg, LLC

Case Number: 39 Y 110 00107 97

AWARD OF THE ARBITRATORS

WE, THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the arbitration agreement entered into by the above-named parties, and dated April 4, 1995, and having been duly sworn and having duly heard the proofs and allegations of the parties, AWARD as follows:

Gatlinburg, LLC shall pay to Frizzell Construction Company, Inc. the sum of Six Hundred Fifty-One Thousand Three Hundred Twenty-Five Dollars and No Cents ($651,325.00) within thirty (30) days from the final date of this Award, itemized as follows:

CLAIM ITEM	AMOUNT
Amount invoiced for construction	$6,484,103.00
Less: Labor charged after 4/28/97	<35,541.00>
Less: Adjustments for "miscellaneous" items	<131,910.00>
Less: Credits per Invoice #24	<38,715.00>
Subtotal	$6,277,939.00

Less: Adjustment for general conditions	<221,444.00>
Subtotal	$6,056,493.00
Less: Credit to owners – defective/incomplete work	<115,422.00>
Subtotal	$5,941,071.00
Less: Amount paid to contractor	<5,382,792.00>
Past due amount to contractor	558,279.00
Interest due on past due amount	93,046.00
TOTAL AMOUNT DUE	$ 651,325.00

SIGNED: /s/ Edwin Rodgers, Jr. DATE: 8/31/98
Edwin Rodgers, Jr.,
Arbitrator

State of Tennessee
County of Davidson

I, Edwin Rodgers, Jr., do hereby affirm on my oath as arbitrator that I am the individual described in and who executed this instrument, which is my Award.

SIGNED:/s/ Edwin Rodgers, Jr. DATE: 8/31/98
Edwin Rodgers, Jr.,
Arbitrator

All claims or counterclaims not expressly granted are hereby denied.

Each party shall bear their own attorney's fees and costs.

The administrative fees of the American Arbitration Association totalling Seventeen Thousand Six Hundred

Twenty-Three Dollars and No Cents ($17,623.00) shall be borne equally.

The compensation and expenses of the arbitrators totalling Twenty-Eight Thousand One Hundred Fifty-Four Dollars and Ninety-Three Cents ($28,154.93) shall be borne equally.

This Award is in full settlement of all claims and counterclaims submitted in this arbitration.

SIGNED: /s/ William D. Reeves DATE: 9-1-98
William D. Reeves,
Arbitrator

State of Georgia
County of Dekalb

I, William D. Reeves, do hereby affirm on my oath as arbitrator that I am the individual described in and who executed this instrument, which is my Award.

SIGNED: /s/ William D. Reeves DATE: 9-1-98
William D. Reeves,
Arbitrator

SIGNED: /s/ Firooz Israel DATE: 9-1-98
Firooz Israel,
Arbitrator

State of Georgia
County of Dekalb

I, Firooz Israel, do hereby affirm on my oath as arbitrator that I am the individual described in and who executed this instrument, which is my Award.

SIGNED: /s/ Firooz Israel
Firooz Israel,
Arbitrator

DATE: 9-1-98